

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the matter of:)	
)	MM Docket-99-25
Creation of a Low Power Radio Service)	
Amendment of Service and Eligibility Rules)	MB Docket 07-172
or FM Broadcast Translator Stations)	RM-11338
)	

COMMENTS OF COMMON FREQUENCY

Common Frequency, Inc. (“CFI”), a 501(c)(3) nonprofit California corporation that advocates for, assists, and educates community and student organizations regarding applying for non-commercial FM stations, here submits a comment concerning the *Third Further Notice of Proposed Rule Making* concerning MM Dockets 99-25/MB Docket 07-172 (“FNPRM”).

Introduction

CFI is very pleased that the FCC carefully examined CFI’s previous ex parte presentations¹ demonstrating that a prescribed ten-application processing cap would not be successful at accomplishing the intended goal of balancing LPFM and translator services.² CFI applauds the latest FCC proposal of “channel floors”³ within the FNPRM that utilizes a reasoned approach in complying with the terms of the Local Community

¹ Model and Report of CF’s Top 150 Market “Ten Cap” Simulation (September 27, 2010); Study and Report of Select Markets as a Result of Previous Market Simulation (November 12, 2010); Translator Processing Cap Modification Simulation (February 2, 2011)—all filed in ECFS.

² Processing cap outlined in para 53. Third Report and Order and Second Further Notice of Proposed Rulemaking of Creation of A Low Power Radio Service, MM Docket No. 99-25, December 11, 2007. See CF’s September 27, 2010 comment for analysis. Creation of A Low Power Radio Service, MM Docket No. 99-25, December 11, 2007.

³ FNPRM, Para 26.

Radio Act (“LCMA”).⁴ CFI believes that translator and LPFM services need to be balanced according to the particular needs of each local community. While we are aware there is a need to process the remaining Auction No. 83 filings, we also perceive that corporate, speculator, and large networks have utilized loopholes within the application system in an attempt to earmark the last remaining urban frequencies that were never originally intended for translator service. It would be optimal to see translator applicants with local public service intentions share the FM band with prospective LPFM applicants. This comment intends to provide insight into the topics discussed within the FNPRM. In addition, CFI co-submitted a joint comment with Prometheus Radio Project and REC Networks (a separately filed document) further detailing our position regarding fine-tuning the FCC’s “channel floor” proposal.

I. Appropriate Translator Service Definition Is Required Before Assessing Meaning Of Co-equal Relating To Section 5 of the LCMA

The FNPRM specifically analyzes Section 5 of the LCMA to provide insight into the FCC regulatory duty for discerning the proper balance of LPFM and translator service. CFI suggests the FCC should derive a clearer definition of translator service before assessing its relation to LPFM service.

Firstly, the FCC has originally noted the purpose of a translator is to be a “station [that] provides a service to the public which it would not otherwise receive”⁵—and additionally, to “allow FM stations to provide supplementary service to areas in which direct reception of radio service is unsatisfactory due to distance or intervening terrain

⁴ Local Community Radio Act of 2010, H.R.6533.

⁵ Amendment of Part 74 of the Commission's Rules and Regulations to Permit the Operation of Low Power FM Broadcast Translator and Booster Stations, 20 RR 2d 1538.

barriers (e.g., a mountain).”⁶ Nowadays there are national broadcast networks that want translators in many markets, commercial FM broadcasters that want translators to create new HD2- and HD3-fed commercial programming services, and speculators that want translators to profit from either selling or leasing. The FCC should be aware of two questions when crafting regulation to deal with translator processing:

- 1) *Should the aforementioned new translator uses be condonable or have a relevant usage?* We believe the FCC needs to reiterate official legitimate uses for translators.
- 2) *Because there is finite room on the FM band, and secondary services can be licensed in semi-permanent band locations where full power stations cannot be licensed, should the FCC dispense licenses according to highest priority usage for the channel? Would the highest usage be local, diverse (ownership-wise) applicants?* In urban areas, we believe localized service should be given preference.

Secondly, the FCC must properly consider how or whether to apply 47 U.S.C. Section 307(b) to the matter of translators and LPFM service as a whole. Within the FNPRM the FCC reiterates its original intention for enacting a ten-application processing cap for translators:⁷

The Commission considered whether Auction No. 83 filing activity had adversely impacted its goal to provide to both LPFM and translator applicants reasonable access to limited FM spectrum in a manner which promotes the “fair, efficient, and equitable distribution of radio service,” and concluded that processing all of the then-pending 7,000 translator applications would frustrate the development of the LPFM service.⁸

⁶ From “FM Translator and Booster Stations”, FCC website: <http://www.fcc.gov/mb/audio/translator.html>.

⁷ *Supra*, See 2.

⁸ FNPRM, Para 3.

The FCC gauged that 307(b) was applicable to LPFM. However, in terms of translators, the FCC sees them as “accorded ‘no weight’ in assessing local service level in FM allotment proceedings.”:⁹

The Commission, in the analogous context of low-power television and television translator licensing, has stated that the application of Section 307(b) principles would be “inappropriate” because such cases would not “present a meaningful Section 307(b) issue.”¹⁰

However, in modern practice, it may seem arbitrary why secondary services should not directly subscribe to Section 307(b). Please note the following list of licensing inconsistencies:

- 1) Although LPFM is a secondary service, the FCC uses Section 307(b) as a reason to propose a ten-application processing cap.
- 2) Studio-waived full power NCE FM stations generate no local programming, so they are in essence high-powered translators. Yet they qualify under Section 307(b) for licensing.
- 3) HD2- and HD3-fed translators originate new local analog programming on fill-in translators and can have an equivalent reach of up to Class C full power stations. It is assumed under the current FCC definition that these facilities do not subscribe to Section 307(b).
- 4) Urban FM bands, for the most part, have maximized full power broadcast capacity and cannot accommodate new allocated facilities or move-ins.

Secondary services licensed in the next couple years will likely remain there until analog FM service is discontinued as a whole, thus being as permanent

⁹ FNPRM, Para 16, referring to *E.g., Banks, Redmond, Sunriver and Corvallis, Oregon*, Report and Order, 13 FCC Rcd 6596 (MMB 1998) (FM translators not considered in determining services available to a community); *Chillicothe, Dublin, Hillsboro, and Marion, OH*, Report and Order, 20 FCC Rcd 6305 (MB 2005) (FM translators not considered local service).

¹⁰ Para 16, FNPRM, citing *Inquiry Into the Future of Low Power Television Broadcasting and Television Translators in the National Telecommunications System*, Report and Order, BC Docket No. 78-253, 47 Fed. Reg. 21468 (1982 (paras 62-63)).

as full power facilities in most instances. In addition, for some time the FCC has informally allowed translators to jump to any open channel if preempted.

The above demonstrates some confusion over subscription to 307(b). The differentiation of service type in relation to 307(b) would appear discernable only to the FCC in terms of regulatory language; the public perceives no difference, and there is operationally little difference. The FM band will likely be incapable of accommodating any new licensing opportunities in a couple short years. Translators, for the most part, will be a permanent fixture on the FM band for years to come. This may appear to complicate the FCC's "main rationale" of "potential preemption"¹¹ from translators being excluded from being guided by 307(b). Thus every secondary service channel must be carefully licensed in a "fair, efficient, and equitable" manner, as most likely they will not ever be superseded. If the FCC has cited 307(b) in enacting a ten cap to preserve space for LPFM, 307(b) must apply in some effect to secondary services. The FCC has asserted in the past that 307(b) pertains to both transmission and reception service. Transmission service "is the opportunity which a radio station provides for the development and expression of local interests, ideas, and talents and for the production of radio programs of special interest to a particular community".¹² Even without the LCMA, it appears that the FCC might need to comply with providing LPFM services in every market under 307(b), and thus there is an implicit duty to balance translators.

II. Assessing The Meaning Of LCMA Section 5 As It Pertains To Application Processing And Procedures

CFI agrees with the FCC's interpretation that "the ten-application cap is inconsistent with Section 5(1) because it would not 'ensure' that licenses will be available in

¹¹ FNPFM, Para. 7.

¹² Rulemaking concerning main studios, 15 FR 8993 (1950).

spectrum-congested markets for future LPFM licensing.”¹³ The FCC asks about the assurance stipulation directly associated with the LCMA mandate. The following is our interpretation of this mandate.

1. LCMA Sections 5(1) and 5(3): The LCMA Implies More Than Balancing The Number of Large Apples With Small Oranges; It Implies Equal Service Among Populations

Sections 5(1) and 5(3) of the LCMA—analyzed together here—make one potent assertion, which is licenses should be available to translators and LPFM stations similarly, and those licenses should be equal in status. However, there is an issue to be dealt with concerning mandated equal status: *translator service is currently superior*. The FCC states in the FNPRM that translator placement rules are “substantially more flexible”. Translator service has an advantage in coverage and placement by virtually all factors.¹⁴ We agree with the FCC’s notion that translator and LPFM service needs to be balanced within the realm of Arbitron market, but the technical superiority of translators precludes us from simply counting equal numbers of LPFM and translator facilities as a meter to archive spectrum-balancing. Comparing translators and LPFM facilities just by number of facilities is like comparing apples and oranges.

Section 74.1235 defines the maximum wattage of a translator of 250 watts at 107 meters HAAT (as wattage logically decreases with increasing HAAT). Section 73.811 states the maximum facilities for an LPFM to be 100 watts at 30 meters HAAT. This allows a translator to obtain a maximum of 5.5 times the coverage area compared to an LPFM facility. One translator could thus have more 60-dBu coverage than five LPFM stations. So, in a hypothetical “worst-case” LPFM scenario, attempting to balance each

¹³ FNPRM, Para. 9.

¹⁴ Consider the difference in third, second, first, and co-channel protection, IF protection of full power stations, Channel 6 protection, and LPTV protection.

market with an equal number of translator and LPFM facilities, translator coverage could be 5.5 times greater than LPFM coverage.

But it gets even more complicated. Consider fill-in translators, which can exceed the specified FCC translator maximum wattage ceilings per HAAT. Take for example K238AF, Santa Rosa, California, a greater San Francisco Bay Area market translator. With 240 watts at 283.5 meters HAAT K238AF roughly equals 1483 sq km of coverage, or almost 15 times the 60-dBu coverage area of an LPFM facility. Perhaps a grander market-illustrative example is three *fill-in translators* in Atlanta, Georgia, none receiving a primary analog feed off any FM full power station in the market. W250BC is a 250-watt translator broadcasting at 303 m HAAT. It is a Cumulus-owned translator that rebroadcasts WWWQ-HD3, an 80's/90's hits format made expressively for the translator, with a coverage area of 1618 sq km covering core Atlanta. This is essentially equivalent to a commercial LPFM station broadcasting at 30 m HAAT with 25 kW of power. W256BO is another Atlanta translator owned by Cumulus that rebroadcasts WWWQ-HD2, a commercial alternative radio format expressively for the translator. W229AG is an additional fill-in FM translator—220 watts at 303 m HAAT—that rebroadcasts 50 kW watt daytime/10 kW nighttime Atlanta station WCNN-AM in core Atlanta. The combined 60-dBu coverage of all three translators is equivalent to the coverage area of 40 LPFM stations.

For a grander individual case, take K256AE Provo, Utah. At 250 watts at 814 m HAAT that essentially creates another Salt Lake City-area full power station with a broadcast radius of 38 km—a **60-dBu area roughly 46 times the footprint of an LPFM facility**. It rebroadcasts KJMY's HD2 channel, which is branded as a completely different commercial radio station for the Utah Valley with its own web page (see

<http://www.classiccountry991.com>). Provo also has seven other mountain translators serving it.¹⁵ HD2 and HD3 channels rebroadcasting on translator fill-in channels are essentially an established broadcaster's tool to create new full service commercial stations in markets without worrying about an ownership cap. And even more unfortunate, the FCC's rules favor fill-in translators.¹⁶

Taking the above into consideration, local spectrum balancing cannot actually materialize when translator applicants have the future flexibility to hoard spectrum in ways LPFM service cannot touch. Translator licensees could essentially use every last bit of spectrum to blast signal around an LPFM's 60-dBu contour from rimshot mountain translator sites. Section 5 of the LCMA, by the title, appears to delve into *ensuring spectrum* for LPFM service, with Section 5(3) stating the services be *equal*. We interpret this as implying the overall goal of *equal spectrum* for each service. If the current FNPRM goal is to balance the number of translator and LPFM facilities under the current regulations, we could be balancing large apples and baby oranges. This then loses any meaning under the decree of how we actually interpret LCMA as serving "equal" number of local population.

Sections 74.1235 and 73.811 conflict with each other, and our interpretation of the LCMA because they imply unequal service by definition. CFI agrees with the FCC's proposed "channel floor" proposal, but the FCC's rulemaking needs to take into consideration how to balance spectrum availability by either making LPFM and translator technical specifications and availability similar, or introducing a scalar value to average spectrum coverage if unequal coverages exist per facility type. Although technical

¹⁵ K202CC, K204BO, K208BZ, K217CL, K225AP, K237FG, K252DB

¹⁶ See 74.1233(e)(1), "Applications for FM translator stations proposing to provide fill-in service... will be given priority over all other applications."

changes for translator and LPFM service are a subject for a future LPFM rulemaking, they are pertinent to balancing spectrum, which is relevant to the processing of remaining Auction No. 83 filings.

2. LCMA Section 5(2): Needs Of The Community

LCMA Section 5(2) states that when licensing translator and LPFM stations “such decisions are made based on the needs of the local community.” CFI interprets this as defined:

- Urban communities usually do not need translator service since translator service was originally supposed to supplement a service unavailable in a particular area. Urban communities are usually equipped with most common commercial and noncommercial formats. What they are lacking is local community-level programming and programming representative of underrepresented demographics, which can be supplemented by LPFM service.
- Rural communities have an overall lack of radio service. Translators are an important supplemental service, but this supplemental service should not preclude an equal right for local service.

With interpretation of the above:

FNPRM “channel floor” is justified: LPFM appears to present itself as the most relevant usage of secondary service channels in urban areas. For this reason, the LPFM “channel floor” “no-process” markets, proposed in the FNPRM, are justified, especially in large cities where formats that a translator applicant wants to bring-in is already there, making the intended translator service redundant. FNPRM studies the

“core”¹⁷ area of the Arbitron market and not the entire market; this makes sense. In essence, the markets are to achieve some type of equality. Per Section 5(2), in the core city, translator service is needed less than new service. On the edges of the market, there may be need for supplemental service.

Additional translator processing stipulations for FNPRM “process” markets: In FNPRM-proposed translator “process” markets; additional translator application processing limitations should be enacted for mass filers. If a translator applicant has more than one pending application in the market, only one application per market should be processed. In several markets, a select group of applicants hold a majority of redundant-market-coverage applications. The FCC has even acknowledged this in the FNPRM.¹⁸ For example, Fresno, California is considered a translator “process” market.¹⁹ One applicant alone holds 96 applications—or 67% of the total 142 applications—pending for Fresno-area channels. Two applicants hold 123—or 87% of the applications—pending for Fresno-area channels. There would appear to be no LPFM channels open in downtown Fresno if all the pending channels in Fresno are granted to roughly two applicants. Limiting processing to one channel per applicant per market would be a way to ensure a more equitable distribution of secondary service channels within proposed FNPRM “process” markets only.

A nationwide cap for interstate broadcasters: A nationwide cap may be warranted for interstate broadcasters. CFI is convinced there seems little use for nationwide FM networks in today’s scarce FM channel environment. A numerical cap should exist that

¹⁷ FNPRM, Appendix Para. 1.

¹⁸ FNPRM, Para 33: “Similar filing imbalances occur in particular markets and regions. One applicant holds 25 of the 27 translator applications proposing locations within 20 kilometers of Houston’s center city coordinates and 75 applications in Texas. Two applicants hold 66 of the 74 applications proposing service to the New York City market.”

¹⁹ FNPRM, Appendix A Chart.

is applicable to what we will define as “distant translators”—translators outside a pre-designated number of miles from where the programming is originally produced. The specific number of translators for capping, and radius, should be a subject of debate.

“Conservation of channels” waiver for large-number translator licensees: In several urban markets, translator licensees may hold multiple channels to piece-together complete market coverage. In certain limited instances, it may make sense to allow a licensee to “merge” two or more central market translators into one channel so frequencies can be recycled for central-market LPFM service. The FCC could offer a new “consolidated” channel equivalent fill-in translator service coverage (250 watts at expanded HAAT) in return. The licensee would have to show, for example, that 1) the channel consolidation would open up many LPFM channel opportunities in centrally populated areas, 2) the proposed consolidated channel would not encroach on existing LPFM or NCE coverage (including fringe listening), 3) the proposed consolidated channel would not “hop” or move piecemeal into a more urbanized area, and 4) each licensee is limited to one consolidated-type channel per market.

III. Commission Proposals For Processing Remaining Auction No. 83 Filings

FCC recommends three processing proposals in relation to the remaining Auction No. 83 filings:

Open a Joint Translator/LPFM Application Window: Although a novel option, there seems to be complicated questions concerning how to process mutually exclusive filings when presented with non-commercial translator applications, commercial translator applications, and LPFM applications. The situation could be accommodated by a whole new application processing strategy, as commercial auctions and point systems are

incongruent processing regimes as concomitant to the LCMA. This is CFI's least-favored option, as deep regulatory procedures would need to be rewritten.

Establish a Priority for Future LPFM Applications: CFI feels this may be a viable option, as "to defer consideration of all translator applications until after the next LPFM window" would likely provide urban populations the greatest availability to weigh-in regarding Section 5(2) of the LCMA, and equalize filings according to 5(1) and 5(3). However, the FCC's third proposal might be more cleanly enactable from a regulatory perspective.

Adopt a Market-Specific Translator Application Dismissal Processing

Policy: The FCC's third option would be to perform an analysis on primarily the top 150 markets with the proposal of "channel floors". Checks would be made within a "core" market grid to determine minimum LPFM availability, thus guiding translator processing per market. CFI favors this option, but some optimization of the channel floor method is recommended. Within a joint filing submitted by CFI, Prometheus Radio Project, and REC Networks, filed under this Docket, the three parties elaborate on a proposal to better encapsulate each metro study area.

Within Appendix A of the FNPRM, the FCC states, "The grid [market study area] is not intended to approximate radio market boundaries. Rather, this methodology is designed to identify 'core' market locations that could serve significant populations." CFI feels that in order for the channel floor methodology to be more in-tune with individual markets, the FCC needs to better define "core" market. The FCC utilizes the same study area of core market for New York City, market 1, up to Peoria, market 150. It is intuitively recognizable that many core market areas could contain substantial rural areas. For example, in the Sacramento, California market—a top 30 market—38% of

the study grid area contains 99% of the grid area population, signifying that the rest of the area is chiefly farmland, floodplain, or undeveloped land (see Appendix). If the LPFM channels reside in the 62% composed of mainly farmland, this may skew total usable LPFM channel availability within the market.

IV. Other Considerations

The FCC FNPRM asks for comments regarding associated issues on translators and LPFM service:

Translator Settlement and Modification: We agree with the FCC that safeguards need to be in place in translator process areas to make sure LPFM channels are retained according to the balanced channel floor studies. For that reason, the FCC should freeze minor modifications of pending translator applications (no technical settlement window), or defer processing of translators until an LPFM filing window has taken place. We also agree that some type of limitation for modifications of currently licensed translators might be in order regarding inter-metropolitan moves.

Abuse Prevention of Permits and Licenses: The FCC seeks input upon processing policies that deter abuses regarding the remaining pending translator applicants.²⁰ CFI believes the FCC should collect more information regarding the translator purpose on the translator application, and implement measures that deter trafficking and unorthodox translator uses. CFI believes part of the problem regarding translator abuses is that the FCC does not hold an applicant to any type of proposal:

²⁰ FNPRM, Para. 34: "We also seek comment on processing policies to deter the potential for speculative abuses among the remaining translator applicants."

- First, the FCC should ask specifically what the translator application/construction permit is being used for to hold an applicant to a proposal. This might cut down on frivolous proposals. Such suggestions include:
 - 1) Asking the applicant (a) to commit to rebroadcasting a specific source for a minimum of two years, even if assigned, (b) to indicate if the applicant has received permission to rebroadcast the source, and (c) to demonstrate the signal being broadcasted can be received at the translator location (if on the non-reserved band).
 - 2) Asking the applicant the reason for the translator application. The options given could include:
 - A) **Fill-in service for an existing station:** *Provide an engineering attachment demonstrating why the full power station's signal is technically deficient within part of its protected contour.*
 - B) **Extending commercial FM or LPFM to a new area:** *Attach an exhibit demonstrating the deficiency of local broadcast service in the area, and that the applicant has no financial or any other connection with the broadcaster.*
 - C) **Extending NCE service to a new location:** *Attach an exhibit demonstrating that the service is "based on the needs of the local community" per LCMA Section 5(2), and the programming from the main studio is not currently being rebroadcasted on more than 30 [or X amount] "distant" translators. [note: this latter stipulation not codified, but recommended above in our comment as a limiting factor].*

- Second, the translator should be owned and operated for two years by the entity that applied for the channel. The translator should be operated for four years before money from any assignment can be sought. In other words, assignment is allowed after two years, but there would be a four-year moratorium on receiving money for the license no matter who is holding the license.

- Third, in leasing a translator to a third party, the licensee can only ask for the amount to compensate operating expenses—no exaggerated figures. This would essentially disincentivize profiteering regarding leasing translators as a whole.

- Fourth, broadcasting redundant programming feeds on multiple translators, or translators and full power stations in certain cases, in a community should be ended. This, at times, is a waste of FM spectrum and does not meet the “needs of the local community” under LCMA Section 5(2).

- Fifth, end commercial broadcasting HD2- and HD3-fed (new programming) translators. The practice is essentially adding another commercial radio station to the market, and not fill-in service.

Timing of LPFM Filing Window: It is important that there be ample time to communicate with prospective LPFM applicants prior to any LPFM filing window. In 2007, prior to the NCE filing window, radio application engineers were tied up for months before the filing opportunity because they were overbooked with applications. In the case of educational applicants, it usually takes substantial time for teachers and students to acquire permission from educational administrations and boards to apply for radio permits.

Considering that there will be a small window for every entity that ever wanted to apply for a radio station in the last decade, a comprehensive outreach needs to occur between a handful of LPFM advocates. At this point, the fall of 2012 appears to be the soonest we would be comfortable having a filing opportunity open pending the final LPFM rules being distributed towards the beginning of the year. Regional filing windows would be preferable to one giant filing window to ease demand for filing support from engineers, lawyers, and supporting advocates, whom will all be in short supply.

Concerning Re-broadcast of AM Stations: The possible rebroadcast of AM stations on translators has basically created a brand new price-inflated market for translators, and a fierce competition for secondary service channels with prospective LPFM applicants. CFI understands that in certain circumstances the need for FM translator supplementation by AM licensees. However, there is limited capacity on the FM band for AM stations that want to supplement their AM signal. More selective qualifying criteria for AM licenses needs to be derived before removing the limit on cross-service translators as asked.²¹ Qualifying criteria such as local ownership, diversity of ownership, amount of locally-originated programming, and amount of signal deterioration at nighttime compared to daytime service area should be mulled over to craft selectivity points. Additionally, licensees that do not currently own FM channels in the market seem better candidates than those who do.

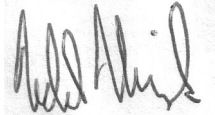
V. Conclusion

CFI concurs with the FCC's proposal for a "channel floor" solution to provide for proper balance between LPFM and translator licensing. In addition, the FCC might want

²¹ See FNPRM, Part D, where FCC ask for comments on the issue of whether cross-service translators should remain limited to those authorized.

to delve into a number of small measures to patch translator loopholes and place translators and LPFM service on the same technical footing in order to bring the services under compliance with the LCMA.

Respectfully Submitted By,

A handwritten signature in black ink, appearing to read "Todd Urick", is positioned above the printed name.

Todd Urick
Technical Director
Common Frequency
September 4, 2011

Appendix

Example Market: Sacramento, California is a top 30 market yet 38% of its “core” market study area (as defined by 31x31 minute area) encompasses 99% of the study area’s population. LPFM channels found in the shaded (pink) area may skew the actual availability for the market. The market also appears asymmetrical in nature. These types of attributes should be taken into consideration if further optimization of the “core” study area is considered regarding the “channel floor” proposal.

